

EXHIBIT 17
DATE 1-21-11
HB 68

FindLaw[®] FOR LEGAL PROFESSIONALS

Supreme Court of Montana.

STATE v. NELSON

STATE of Montana, Plaintiff and Appellee, v. Timothy Scott NELSON, Defendant and Appellant.

No. DA 07-0339.

-- October 28, 2008

For Appellant: Justin B. Lee, Burk, Lee & Bieler, PLLC, Choteau, Montana, Colin M. Stephens, John E. Smith Law Offices, Missoula, Montana. For Appellee: Hon. Mike McGrath, Montana Attorney General, Tammy Plubell, Assistant Attorney General, Helena, Montana, Mary Ann Ries, Pondera County Attorney, Conrad, Montana. For Amicus Curiae Patients and Families United and American Civil Liberties Union Foundation of Montana: Elizabeth L. Griffing, ACLU of Montana Foundation, Missoula, Montana, Craig Shannon, Patients and Families United, Missoula, Montana.

¶ 1 Timothy Scott Nelson (Nelson) appeals two sentencing conditions imposed on him in the District Court of the Ninth Judicial District Court, Pondera County. We reverse the imposition of the challenged sentencing conditions and remand for further proceedings consistent with this Opinion.

FACTUAL AND PROCEDURAL BACKGROUND

¶ 2 Sometime in April 2006, Pondera County Deputy Sheriff Carl Suta (Deputy Suta) was contacted by a citizen informant who was known to Deputy Suta. The citizen informant stated that s/he had been at a house in Conrad, Montana, when s/he inadvertently went into a basement room containing several marijuana plants. After receiving this information, Deputy Suta and Agent Mark Hilyard (Agent Hilyard) of the Montana Department of Justice went to investigate. They observed a basement window covered with black plastic and a PVC pipe protruding from the basement, both of which indicated to Agent Hilyard the possibility that the basement was being used as a marijuana grow room.

¶ 3 On April 10, 2006, Agent Hilyard and Deputy Suta collected garbage from the residence. An examination of the garbage revealed Zig-Zag Premium Cigarette tubes, a Jiffy greenhouse expandable pellet container, a marijuana stem and burnt toothpick, and gold tinfoil that contained marijuana stems and seeds. The officers field tested these items and determined they were consistent with the use and production of marijuana plants. The garbage search also turned up mail with Nelson's name on it, and the names of two other residents of the house, Christine Hovde (Hovde) and Michelle Murray (Murray). Deputy Suta was familiar with Murray and knew that she had previously been involved with law enforcement. In December 2005, Murray had offered to provide information to a Teton County deputy about the existence of a methamphetamine lab, but later retracted her offer.

¶ 4 On April 24, 2006, Deputy Suta obtained a search warrant for the residence. A search of the house turned up evidence of a marijuana grow operation. While conducting this search, officers also found several items which suggested a possible clandestine methamphetamine lab, including a couple of cardboard boxes labeled "extra lab equipment" or "lab shit," and rubber gloves stained with iodine. Officers then stopped their search and obtained a second search warrant. As officers were leaving the house, Murray pulled into the driveway.

¶ 5 Upon conducting a search of the house pursuant to the second warrant, officers uncovered a significant amount of evidence indicating that the residents of the house were cooking methamphetamine there. Additionally, several marijuana pipes, seeds, and containers of marijuana were found in the house, along with a bottle of morphine. It was also discovered that Hovde's two school-aged children lived in the house and had access to all levels of the house, and that their clothing was mixed in with various components of the methamphetamine lab. Murray subsequently agreed to talk to the officers after being arrested and given a Miranda warning. She admitted to using marijuana, but denied any knowledge of the existence of a methamphetamine lab.

¶ 6 Based on the evidence obtained pursuant to the two searches, the Pondera County Attorney charged Nelson with the following seven counts on May 16, 2006: Count I, operation of unlawful clandestine laboratory; Count II, criminal possession of precursors to dangerous drugs; Count III, criminal possession or manufacture of dangerous drugs; Count IV, criminal endangerment; Count V, misdemeanor criminal possession of dangerous drugs; Count VI, felony criminal possession of dangerous drugs; and Count VII, criminal possession of drug paraphernalia.

¶ 7 Nelson suffers from a degenerative disc disorder and has had four surgeries on his back. These injuries were sustained by Nelson when he was thrown from a vehicle in an accident involving a drunk driver. Nelson had applied with the Montana Department of Public Health and Human Services (DPHHS) to be a qualified patient in Montana's medical marijuana program (Program) and to be entitled to the lawful use of medical marijuana. The statutes governing the Program are set forth in the Medical Marijuana Act (MMA), Title 50, chapter 46, MCA, which implements a voter initiative approved on November 2, 2004. Under the MMA, it is legal for citizens to use medical marijuana in

order to treat a variety of “debilitating medical conditions,” provided they have received written certification from a physician that the potential benefits of medical marijuana use would outweigh the health risks, they are accepted in the Program by DPHHS, and otherwise comply with the requirements of the MMA. Sections 50-46-102 and -103, MCA. The debilitating conditions for which medical marijuana may be used are specifically defined in the MMA as follows:

- (a) cancer, glaucoma, or positive status for human immunodeficiency virus, acquired immune deficiency syndrome, or the treatment of these conditions;
- (b) a chronic or debilitating disease or medical condition or its treatment that produces one or more of the following:
 - (i) cachexia or wasting syndrome;
 - (ii) severe or chronic pain;
 - (iii) severe nausea;
 - (iv) seizures, including but not limited to seizures caused by epilepsy; or
 - (v) severe or persistent muscle spasms, including but not limited to spasms caused by multiple sclerosis or Crohn's disease; or
- (c) any other medical condition or treatment for a medical condition adopted by the department by rule.

Section 50-46-102(2)(a) through (c), MCA.

¶ 8 Furthermore, the MMA specifically defines “medical use” as,

[T]he acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marijuana or paraphernalia relating to the consumption of marijuana to alleviate the symptoms or effects of a qualifying patient's debilitating medical condition.

Section 50-46-102(5), MCA. Additionally, the MMA further provides as follows:

- (1) A qualifying patient or caregiver who possesses a registry identification card issued pursuant to 50-46-103 may not be arrested, prosecuted, or penalized in any manner or be denied any right or privilege, including but not limited to civil penalty or disciplinary action by a professional licensing board or the department of labor and industry, for the medical use of marijuana or for assisting in the medical use of marijuana if the qualifying patient or caregiver possesses marijuana not in excess of the amounts allowed in subsection (2).
- (2) A qualifying patient and that qualifying patient's caregiver may not possess more than six marijuana plants and 1 ounce of usable marijuana each.

Section 50-46-201(1) and (2), MCA (emphasis added).

¶ 9 On December 8, 2006, subsequent to being charged with the drug-related counts, Nelson was accepted by DPHHS into the Program, placed on DPHHS' confidential registry, and issued an identification card indicating his participation in the Program. On February 7, 2007, Nelson entered into a plea agreement with the State. In exchange for pleading nolo contendere to Count III, criminal possession or manufacture of dangerous drugs, Nelson received a three-year deferred imposition of sentence, and the State agreed to dismiss the remaining six counts. On February 26, 2007, Nelson appeared before the District Court and formally pled no contest to the charge in Count III.

¶ 10 During the sentencing hearing, the District Court expressed concerns about Nelson's use of medical marijuana, particularly given that Nelson apparently acted as a parent to Hovde's two school-aged children. The District Court asked Nelson's attorney Justin B. Lee (Lee) how Nelson participated in the Program. Lee explained that Nelson submitted an extensive application to DPHHS describing his chronic pain condition, and that upon acceptance into the Program he was allowed to use medical marijuana under the provisions of the MMA. However, Lee explained that a physician could not actually prescribe marijuana due to federal licensing restrictions. The State offered that it had spoken to officials at the Department of Corrections, who opined that they would not allow Nelson to smoke marijuana while under their supervision, but would allow him to use the pill form of marijuana, Dronabinol, as prescribed by a physician. Lee argued that such a restriction on Nelson's use of medical marijuana would be cost prohibitive for him due to the expense of Dronabinol, and was thus contrary to the intent behind the passage of the MMA, which was to allow individuals to obtain medical relief through the use of medical marijuana in a manner that was cost-effective.

¶ 11 The District Court was unpersuaded by Lee's argument and concluded it was in the best interests of the children to restrict Nelson to the prescription pill form of marijuana during the deferred term of his sentence. The District Court acknowledged the legitimacy of the MMA, but believed that restricting Nelson's use of medical marijuana in this manner would be less intrusive to family members and help him be a better parent to the children.

¶ 12 Nelson was ultimately given a three-year deferred imposition of sentence subject to twenty conditions. Condition No. 9, as set forth in the Judgment and Sentence, reads in part as follows:

The Defendant shall comply with all city, county, state, federal laws, ordinances, and conduct himself as a good citizen.

¶ 13 Condition No. 10 reads as follows:

The Defendant will not possess or use illegal drugs or any drugs unless prescribed by a licensed physician. Although the Defendant states he has a medical use exception which allows him to possess marijuana, the Defendant may not possess marijuana except in pill

form and only then by prescription from a licensed physician. The prescription may not be more than 6 months old. The Defendant may not have a prescription older than 6 months in his possession. The Defendant will not be in control of or under the influence of illegal drugs, nor will he have in his possession any drug paraphernalia.

¶ 14 Nelson now timely appeals the imposition of these two sentencing conditions. Nelson maintains the District Court imposed an illegal sentencing condition in Condition No. 10 by restricting him to the use of medical marijuana in prescription pill form. He also maintains that the District Court exceeded its authority in requiring him to obey all federal laws in Condition No. 9, because federal law, in particular the Controlled Substances Act (CSA), codified at 21 U.S.C. § 801, prohibits the possession of marijuana and does not provide an exception for the use of medical marijuana pursuant to state law. See 21 U.S.C. §§ 841, 844. Nelson argues that the District Court is improperly enforcing federal law against him by restricting him from the lawful use of medical marijuana under state law. Amici Curiae American Civil Liberties Union Foundation of Montana and Patients and Families United (collectively Amici), join Nelson in seeking a reversal of these sentencing conditions. The State urges us to affirm these conditions, arguing that they do not constitute an illegal sentence and that the District Court did not abuse its discretion in imposing them.

¶ 15 On December 27, 2007, after the issues before the Court were fully briefed by the parties, the State filed a motion to strike material contained in Nelson's reply brief on the grounds that it was outside the record. Specifically, the State sought to strike from the reply brief two appendices and supporting discussion whereby Nelson sought to "correct" certain information contained in the pre-sentence investigation (PSI). We subsequently took the motion under advisement. Because the disputed portions of Nelson's reply brief played no role in the disposition of the matter before us, the State's motion to strike is rendered moot. Thus, we restate the issues on appeal as follows:

¶ 16 Issue One: Did the District Court exceed its statutory authority by requiring Nelson to comply with Condition No. 10 during the term of his deferred sentence?

¶ 17 Issue Two: Did the District Court exceed its authority when it imposed Condition No. 9 and required Nelson to comply with federal law which prohibits the possession of marijuana and does not provide an exception for the use of medical marijuana pursuant to state law?

¶ 18 Issue Three: Did the District Court violate the prohibition on cruel and unusual punishment under the United States Constitution and Article II, Section 22 of the Montana Constitution in imposing Condition No. 10 on Nelson's deferred sentence?

STANDARD OF REVIEW

¶ 19 We review the legality and propriety of sentencing conditions under the two-prong standard as set forth in *State v. Ashby*, 2008 MT 83, 342 Mont. 187, 179 P.3d 1164. First, we review a sentencing condition for legality. *Ashby*, ¶ 9. This inquiry requires us

to consider whether the district court lacked statutory authority to impose the condition, whether the condition falls outside the parameters set by the applicable sentencing statutes, or whether the district court did not adhere to the affirmative mandates of the applicable sentencing statutes. *State v. Brotherton*, 2008 MT 119, ¶ 10, 342 Mont. 511, ¶ 10, 182 P.3d 88, ¶ 10. This presents a question of law which we review de novo. *Brotherton*, ¶ 10.

¶ 20 Second, “because sentencing statutes authorize sentencing judges to impose conditions on deferred or suspended sentences that constitute ‘reasonable restrictions or conditions considered necessary for rehabilitation or for the protection of the victim or society,’ the ‘reasonableness’ of such conditions will be reviewed for an abuse of discretion.” *Ashby*, ¶ 9 (quoting § 46-18-201(4)(n), MCA (2005)). An abuse of discretion occurs when a district court acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, in view of all the circumstances, ignoring recognized principles resulting in substantial injustice. *Schuff v. Jackson*, 2008 MT 81, ¶ 15, 342 Mont. 156, ¶ 15, 179 P.3d 1169, ¶ 15.

DISCUSSION

¶ 21 Issue One: Did the District Court exceed its statutory authority by requiring Nelson to comply with Condition No. 10 during the term of his deferred sentence?

¶ 22 Nelson argues the District Court imposed an illegal sentence upon him by requiring him to abide by Condition No. 10 during his deferred sentence. Nelson asserts that in enacting the MMA, the voters of Montana sought to provide qualifying patients with a cost-effective way to manage pain and treat debilitating conditions, and that limiting him to the use of marijuana in a prescription pill form defeats that purpose and is cost-prohibitive. Nelson argues that under the MMA, his use of medical marijuana should be treated as a prescription drug recommended by a doctor and a lawful means of treating a debilitating condition. Nelson claims his argument in this regard is supported by *People v. Tilehkooh*, 113 Cal.App.4th 1433, 7 Cal.Rptr.3d 226 (3 Dist.2003).

¶ 23 Additionally, Nelson claims Condition No. 10 constitutes an illegal sentence because it denies him the right to use medical marijuana, contravening § 50-46-201(1), MCA. Nelson maintains that the District Court erroneously treated his use of medical marijuana in the home as though it was illegal, and by unduly restricting his use of medical marijuana it prevented him from improving and rehabilitating himself and needlessly required him to suffer physical pain.

¶ 24 In this connection, Amici point out that the District Court did not state that it was attempting to protect the children from second hand smoke or the effects of marijuana, nor did it attempt to set conditions concerning when, where, and how Nelson could smoke, eat, or vaporize marijuana. Instead, the District Court issued a blanket prohibition on the use of marijuana in its plant form. Moreover, Amici note that the MMA does place limitations upon the use of medical marijuana, but does not prohibit qualifying patients

who are under state supervision from using medical marijuana. The provision of the MMA referenced by Amici reads as follows:

(1) This chapter does not permit:

(a) any person to operate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marijuana; or

(b) the smoking of marijuana:

(i) in a school bus or other form of public transportation;

(ii) on any school grounds;

(iii) in any correctional facility; or

(iv) at any public park, public beach, public recreation center, or youth center.

(2) Nothing in this chapter may be construed to require:

(a) a government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of marijuana; or

(b) an employer to accommodate the medical use of marijuana in any workplace.

Section 50-46-205, MCA.

Because of this provision, Amici maintain that once the District Court decided to defer Nelson's sentence, and not sentence him to a correctional facility, it was without authority to carve a new exception to the MMA and prevent Nelson from using medical marijuana in accordance with the MMA while he was under state supervision.

¶ 25 The State urges us to affirm the District Court. As an initial matter, the State notes that Nelson was not a participant in the Program at the time of his arrest or when the State filed the Information against him. The State also notes that Nelson admitted in the PSI that he had used marijuana illegally for years, and suggests that Nelson only elicited the protection of the MMA "after he got caught." In this regard, the State argues that Tilehkooh is distinguishable and that *People v. Bianco*, 93 Cal.App.4th 748, 113 Cal.Rptr.2d 392 (3 Dist.2001) applies. In *Bianco*, a California Court of Appeals held that a trial court acted within its discretion when it imposed a sentencing condition preventing a defendant from using medical marijuana while on probation under California's version of the MMA, the Compassionate Use Act of 1996(CUA), Cal. Health and Safety Code Ann. § 11362.5 (West 1996). *Bianco*, 113 Cal.Rptr.2d at 397. The State urges us to adopt *Bianco*'s reasoning to the effect that "state law providing for the medical use of marijuana does not abrogate the trial court's traditional discretion to impose appropriate conditions of probation," including a restriction on the use of medical marijuana. *Bianco*, 113 Cal.Rptr.2d at 395.

¶ 26 The State further argues that Nelson's past history, along with his conviction and the facts of his case, suggest that he may be addicted to marijuana. Thus, the District Court was within its discretion to prohibit him from smoking marijuana in furtherance of his rehabilitation. Similarly, the State argues that the District Court had legitimate reasons to be concerned for the safety of the children, because in addition to manufacturing marijuana in his home, Nelson had the precursors to a methamphetamine laboratory. These facts suggest that Nelson does not exercise good judgment as a parent, and provided another basis for the District Court to restrict him to the use of marijuana in prescription pill form. Additionally, the State argues that the MMA itself evinces a concern for the safety of children in light of the fact that marijuana is generally illegal, by prohibiting the use of medical marijuana in public places where children congregate. (See ¶ 24.) Thus, under the circumstances of the case, the District Court acted within its discretion in imposing Condition No. 10 out of concern for the children and to ensure that Nelson exercised better judgment as their parent.

¶ 27 Under Ashby, the threshold question is whether the imposition of Condition No. 10 constituted an illegal sentencing condition. Ashby, ¶ 9. In light of the plain language of the MMA, we conclude that the District Court exceeded its statutory authority in imposing Condition No. 10. The District Court unlawfully denied Nelson the right and privilege to use a lawful medical treatment for relief from a debilitating condition under the MMA. Thus, we reverse the imposition of this condition and remand for further proceedings.

¶ 28 In reaching this conclusion, we find the decision of the California Court of Appeals in Tilehkooh persuasive. Tilehkooh, a participant in California's medical marijuana program, was convicted of misdemeanor possession of marijuana, and subsequently found to have violated a probation condition on the basis that he possessed and was using marijuana. Tilehkooh, 78 Cal.Rptr.3d at 230-31. The CUA, like the MMA, contained a provision that prevented users of medical marijuana from being "subject to criminal prosecution or sanction." Tilehkooh, 7 Cal.Rptr.3d at 229 n. 3 (quoting Cal. Health and Safety Code Ann. § 11362.5(a)(B) (West 1996)). In light of the plain language of the CUA, the California Court of Appeals reversed the conviction for the probation violation primarily because a probation condition which prohibited the lawful use of a prescription drug could not be said to serve a "rehabilitative purpose." Tilehkooh, 7 Cal.Rptr.3d at 229. As stated by the court in Tilehkooh,

A probation condition, even if it is not a violation of the criminal law, must be reasonably related to the crime of which the defendant was convicted or to future criminality. However, it ordinarily cannot be said that the treatment of an illness by lawful means is so related.

Tilehkooh, 7 Cal.Rptr.3d at 234 (quotation omitted).¹

¶ 29 Simply put, the MMA, like the CUA, takes the possession and use of medical marijuana "and puts it in a special category apart from other legal acts, such as the use of alcohol, that can properly be made a condition of probation." Tilehkooh, 7 Cal.Rptr.3d at 237 (Morrison, J., concurring). When a qualifying patient uses medical marijuana in